No. 92-75

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

THE LUBRIZOL CORPORATION,

Petitioner,

vs.

EXXON CORPORATION, *et al.*;

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT EXXON CORPORATION

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QUESTION PRESENTED

Does *Salve Regina College v. Russell*, 111 S. Ct. 1217 (1991) require the Fifth Circuit to ignore determinations of New York state law by the Second Circuit and write the words "de novo review" into each opinion in a diversity case?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were the Petitioner, The Lubrizol Corporation, and the Respondents, Exxon Corporation, Charles R. Evans, Richard D. Lower and Gates Data Center.

Pursuant to Supreme Court Rule 29.1, the following list identifies all subsidiaries (except wholly-owned subsidiaries) and all affiliates of Exxon Corporation:

EXXON CORPORATION

*Affiliates and Subsidiaries—Not Wholly-Owned**

AGA Progas a s
AT&S Exploration Ltd.
Abu Dhabi Petroleum Company Limited
Ace Polymer Co., Ltd.
Aditivos Orinoco, C.A.
Adria-Wien Pipeline Gesellschaft mit beschrankter Haftung
Aircraft Fuel Supply B. V.
Aishin Sekiyu K. K.
Alberta Products Pipe Line Ltd.
Al-Jubail Petrochemical Company
Altona Petrochemical Company Limited
Alyeska Pipeline Service Company
Aromatics (Thailand) Company Limited, The
Asakawa Sekiyu K.K.
Associated Oil Company (Kyneton) Pty. Ltd.
Atlas Supply Company
Atlas Supply Company of Canada Limited
Australian Synthetic Rubber Company Limited

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* Does not include companies with less than 5% Exxon Ownership.

Aviation Services Saudi Arabia Limited
Awaji Gas Nenryo Kabushiki Kaisha
Azuma Sekiyu K.K.
BEB Erdgas und Erdoel GmbH, Hannover
BT Asia Securities Limited
B.W.O.C., Inc.
Bangkok Aviation Fuel Services Limited
Banshu Ekika Gas K. K.
Bayerische Erdgasleitung G.m.b.H.
Beaverhill Resources Limited
Bel-Air Entreposage S. A.
Brickwood Holdings Pty. Ltd.
BRIGITTA Erdgas und Erdoel GmbH, Hannover
Bryan Woodbine Gathering Inc.
Byron Creek Collieries (1983) Limited
Canadian Reserve Oil & Gas Ltd.
Carlew Inc.
Carnduff Gas Limited
Cary Chemicals Inc.
Cascade Fertilizers (1990) Limited
Castle Peak Power Company Limited
Champlain Oil Products Limited
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Chūō Sekiyu Hanbai K.K.
Clermont Coal Mines Limited
Comcor Chemicals Limited
Commercial Polymers Pty. Ltd.
Compagnie Industrielle des Polyethylenes de Normandie, GIE (CIPEN)
Compania Minera Disputada de Las Condes S.A.
Comptoir Auxiliarie de Petrole
Comptoir Oxonnaxien des Combustibles (C.O.C.)
Computer Centrum Groningen B.V.
Cynthia Gas Gathering Company Limited
DFTG Deutsche Fluessigerdgas Terminal GmbH

Daihatsu Sekiyu K.K.
Daiichi Kouyu K.K.
Daito Gas K.K.
Depot Petrolier du Gresivaudan
Depots de Petrole Cotiers
Depots Petrolier de la Corse
Deudan-Holding GmbH
Deutsche Erdgas Transport G.m.b.H.
Deutsche Transalpine Oelleitung G.m.b.H.
Devon Estates Limited
Dixie Pipeline Company
Dukhan Service Company
ERC Malaysia Inc.
E S F Limited
Eagle Kenso K.K.
East Texas Salt Water Disposal Company
Eastcoast Spill Response Inc.
Eiko Sekiyu K.K.
Elwerath Erdgas und Erdoel GmbH, Hannover
Elwerath Erdoel and Erdgas AG
Emirates Chemicals Company
Emori Sekiyu K.K.
Emsland-Erdoelleitung G.m.b.H.
Energie Marketing Service GmbH (EMS)
Entrepot Petrolier de l'Aveyron (E.P.A.)
Entrepot Petrolier de Mulhouse (E.P.M.)
Erdgas-Verkaufs-Gesellschaft m.b.H.
Esso Canada (A limited partnership)
Esso Chemical Alberta Limited
Esso Energie G.I.E.
Esso Exploration and Production Angola Inc.
Esso Lub'Services
Esso Malaysia Barhad
Esso Northwest Territories (an Ontario Limited Partnership)
Esso of Canada Limited

ESSO OIL Tankstellen Gesellschaft m.b.H.
Esso Resources Canada an Alberta limited partnership
Esso Resources Canada Limited
Esso Resources Enterprises Ltd.
Esso Resources N.W.T. Limited
Esso Resources (1989) Ltd.
Esso Resources Properties Inc.
Esso Resources Ventures Limited
Esso Societe Anonyme Francaise
Esso Standard Tunisie S. A.
Esso Technologies et Services (E.T.S.)
Establissements Cloarec
Exxon Chemical Pakistan Limited
Exxon Chemicals Polymeres SNC
Exxon Supply Company
F. T. Giken Kabushiki Kaisha
Federated Pipe Lines Ltd.
Ferngas Nordbayern G.m.b.H.
Ferngas Salzgitter GmbH
Forjas de Colombia, S. A.
Fuji Kogyo K.K.
Gasunie Engineering B.V.
General Bussan K.K.
General Highway K.K.
General Petrochemical Industries Limited
General Sekiyu K.K.
General Sekiyu Okinawa Hanbai K.K.
General Sekiyu Overseas Ltd.
General Shipping Co. Ltd.
General Unyu Kabushiki Kaisha
Geobutane—Lavera
Gewerkschaft Brassert Erdoel und Erdgas GmbH
Gewerkschaft Erdoel—Raffinerie Deurag-Nerag
Gewerkschaft Gute Hoffnug Erdgas und Erodel GmbH
Gewerkschaft Kuechenberg Erdgas under Erdoel GmbH

Glen Park Gas Pipe Line Company Limited
Grande Ecaille Land Company, Inc.
Groupement d'Exploitation du Depot de Reception de Chennevieres (G.E.D.R.C.)
Groupement Immobilier Petrolier
Groupement Liants Routiers du Gard Esso—Viafrance (G.L.R.G.E.V.)
Groupement Petrolier Aviation
Groupement Petrolier de la Cote D'Azur
Groupement Petrolier de Nantes (G.P.N.)
Groupement Petrolier du Finistere G.I.E.
Groupement Petrolier du Val-deOMarne (G.P.V.H.)
Hamburger Gaswerke GmbH
Hannoversche Erdoelleitung G.m.b.H.
Hanshin Kyowa Sekiyu K.K.
Hayakawa Sakiyu K.K.
Heinrich Schneider Spedition GmbH
Hiroshima General Gas Juten Kabushiki Kaisha
Hoei Sekiyu K.K.
Hokushin Bussan K.K.
Hokuyu Sekiyu K. K.
Hong Kong Pumped Storage Development Company, Limited
Houston Regional Monitoring Corporation
Hydrant Refuelling System, S.A.
Hydranten-Betriebsgesellschaft
Hydrierwerke Poelitz Aktiengesellschaft
Imperial Oil (an Ontario Partnership)
Imperial Oil Limited
Imperial Pipe Line Company, Limited, The
Inada Ekka Gas Kabushiki Kaisha
Industria Acqua Siracusana S.p.A.
Industry Promotion Enterprises Limited
Intamix Corporation
Intoplane Service Company Limited
Iranian Oil Participants Limited

Iranian Oil Services (Holdings) Limited
Iranian Oil Services Limited
Iraq Petroleum Company, Limited
Iraq Petroleum Pensions, Limited
JAYMO SNC
Japan Butyl Company Limited
Japan Coal Liquefaction Development Company, Ltd.
Jersey Nuclear-Avco Isotopes, Inc.
K.K. Aizu General
K.K. Chubu Toresen
K.K. Daimaru
K.K. Eastern Gas Terminal
K.K. General Sekiyu Hanbaisho
K.K. Genetech
K.K. Heian Sekiyu
K.K. Ito
K.K. Kanagwa Sekiyu Shokai
K.K. Kyoei Agency
K.K. Kyoei Shosha
K.K. Kyowa Sekiyu Service
K.K. Marugo Izumasa Shoten
K.K. Marutaka Sekiyu
K.K. Momose Sekiyu
K.K. Nippatsu
K.K. Standard Sekiyu Osaka Hatsubaisho
K.K. Toko
K.K. Toresen
K.K. Uwano Sekiyu Shokai
K/S Statfjord Transport A/S & Co.
Kabushiki Kaisha Sankyo Plastics
Kai Tak Refuellers Company Limited
Kanto Kygnus Sekiyu Hambai K.K.
Karlsruhe-Stuttgart Rohrleitung Gesellschaft mbH
Kawasaki Kygnus Sekiyu Hambai Kabushiki Kaisha
Keihan Sekiyu K.K.

Keiyo Sekiyu Hanbai K.K.
Kenya Petroleum Refineries Limited
Kibo Sekiyu Hanbai K.K.
Kimura Sekiyu Kabushiki Kaisha
Kinwa Sekiyu K.K.
Kobe Standard Sekiyu K.K.
Kowa Sekiyu K.K.
Kowloon Electricity Supply Company Limited
Kumho E. P. Rubber Co., Ltd.
Kygnus Ekka Gas Kabushiki Kaisha
Kygnus Kosan Kabushiki Kaisha
Kygnus Marketing Service K.K.
Kygnus Sekiyu K.K.
Kygnus Sekiyu Seisei Kabushiki Kaisha
Kyushu Eagle K.K.
L12a (Groep) B.V.
L12b/L15b (Groep) B.V.
L15a (Groep) B.V.
LEAG Aktiengesellschaft feur luzernisches Erdoel
Les Docks des Petroles d'Ambes
Lilac Sekiyu Kabushiki Kaisha
Long Beach Oil Development Company
Maasvlakte Coal Terminal B.V.
Maasvlakte Olie Terminal N.V.
Magota Sekiyu K.K.
Mainline Pipelines Limited
Malaysian Energy Chemical & Services Sdn Bhd
Maple Leaf Petroleum Limited
Maruei Gas K.K.
Maruei Service K.K.
Marugo Gas K.K.
McColl-Frontenac Inc.
McColl-Frontenac Oil Co. Ltd.
MEGAL FINCO
MEGAL GmbH

Meiji Sekiyu K.K.
MESBIC Financial Corporation of Houston
Metro Fuel Co. Ltd.
Mikawa Bussan K.K.
Mittelrheinische Erdgas Transport Gesellschaft mit beschreankter Haftung
Montreal Pipe Line Limited/Les Pipe-Lines Montreal Limitee
Mount Thorley Coal Loading Limited
Mr. Lube Canada Inc.
Multi Tank Card B.V.
Mytex Polymers Incorporated
923726 Ontario Limited
NAM—K 7 B.V.
NAM—K 14 B.V.
NAM—K 15 B.V.
NAM—K17 B.V.
NAM/CLOMS—K 8/K 11 B.V.
NAM/CLOMS—L 13 B.V.
NAM/MOBIL M/9a B.V.
NPC Services, Inc.
N.V. Nederlandse Gasunie
Nakabayashi Sekiyu K.K.
Nansei Oil Terminal K.K.
Nansei Sekiyu Kabushiki Kaisha
Nanseki Kaihatsu K.K.
Native Venture Capital Co. Ltd.
Near East Development Corporation
Nederlandse Aardolie Maatschappij B.V.
Neptune Bulk Terminals (Canada) Ltd.
Nichiel Kogyo Kabushiki Kaisha
Nichimo Oil (Bermuda) Co., Ltd.
Nikko Sangyo K.K.
Nippon Unicar K.K.
Nisku Products Pipe Line Company Limited
Nissei Sekiyu Kabushiki Kaisha

Nogat B.V.
Norddeutsche Erdgas-Aufbereitungs G.m.b.H.
Norddeutsche Mineraloelwerke Stettin G.m.b.H.
Nordrheinische Erdgas Transport Gesellschaft mit beschrankter Haftung
Noroxo
Northward Developments Ltd.
Nottingham Gas Limited
107580 Canada Inc.
151742 Canada Inc.
159129 Canada Inc.
160440 Canada Limited
160837 Canada Limited
165548 Canada Limited
165549 Canada Limited
165550 Canada Limited
165899 Canada Limited
168211 Canada Limited
172204 Canada Limited
172965 Canada Limited
173097 Canada Limited
173117 Canada Limited
173150 Canada Limited
175446 Canada Limited
Office Prive d'Assurances et de Courtages
Oil Field Chemicals Company (Saudi Arabia) Ltd.
Oil Service Company of Iran (Private Company)
Oil Spill Response Limited
Oil Transport Company (Saudi Arabia) Limited
Oilship Limited
Oldenburgische Erdoel Gesellschaft m.b.H.
Oleductos Canarios, S.A.
Osaka Ashyu Nenryou K.K.
Osaka Sekiyu Gas Yuso K.K.
OSLO Alberta Limited

P.A.C. S.A.R.L. (Pinson Allegret-Causse)
P.T. Stanvac Indonesia
Pars Investment Corporation
Peninsula Electric Power Company Limited
Petroleum Services (Middle East) Limited
Petrosvibri S.A.
Pioneer Kosan Kabushiki Kaisha
Pipe Line Services, Inc.
Plantation Pipe Line Company
Portland Pipe Line Corporation
Primaer Oel GmbH
Progas Limited
Raffinerie du Midi S.A.R.L.
Rainbow Pipe Line Company, Ltd.
Redwater Water Disposal Company Limited
Refineria Petrolera Acajutla, S.A.
Regulus Holding (Singapore) Pte. Ltd.
Rheingas Erdgasleitungs-Gesellschaft m.b.H.
Rochevert Inc.
Rotterdam Antwerpen Pijpleiding (Belgie)
Rotterdam-Antwerpen Pijpleiding (Nederland) N.V.
Ruhrgas Aktiengesellschaft
S.A. du Pipeline a Produits Petroliers sur Territoire Genevois (SAPPRO)
S.A.R.L. Viain
Saitama Sekiyu Hanbai K.K.
Sanyo Sekiyu K.K.
Saraco S.A.
Saudi Arabian Lube Additives Company Limited
Schubert KG
SEAG Aktiengesellschaft fuer schweizerisches Erdoel
Seismic Industries A/S
Senpoku Oil Service K.K.
SERAM Societa per Azioni
Servacar Ltd.

Shehtah Drilling Limited
Shimoyama Sekiyu K.K.
Shin-Nihon Yukagaku Kogyo K.K.
Shinohara Oil K.K.
Sigel Incorporation
Smiley Gas Conservation Limited
Sociedad de Inversiones de Aviacion
Sociedad Nacional de Oleoductos Ltda.
Societa Italiana per l'Oleodotto Transalpino S.p.A.
Societa per Azioni Raffineria Padana Olii Minerali-SARPOM
Societa Anonyme de Gestion de Stocks de Securite (SAGESS)
Societe Anonyme de la Raffinerie des Antilles
Societe Anonyme des Hydrocarbures
Societe Anonyme "Produits Lubrifiants de Madagasgar" — PROLUMA, S.A.
Societe Civile de Mustapha Algerie
Societe Civile de Participation pour la Destruction des Dachets Industriels (SOCDI)
Societe Civile Immobiliere "Courcelles-Etoile"
Societe Civile Immobiliere "Kleber-Etoile"
Societe de la Raffinerie d'Alger
Societe de Manutention de Carburants Aviation
Societe de Manutention de Carburants Aviation Dakar-Yoff, S.A.
Societe de Promotion de Financement Touristique (CARTHAGO)
Societe d'Entreposage de San-Pedro
Societe des Pipe-Lines de Strasbourg
Societe des Transport Petroliers par Pipe Line
Societe d'Etude te d'Exploitation de la Raffinerie du Tchad — S.E.E.R.A.T.
Societe d'Exploitation & Developpement d'Operations Commerciales
Societe du Caoutchouc Butyl (SOCABU)
Societe du Pipe Line de la Raffinerie de Lorraine
Societe du Pipe-Line Mediterranee-Rhone
Societe du Pipeline Sud-Europeen

Societe Esso de Recherches et d'Exploitation Petrolieres Esso Rep
Societe Francaise Exxon Chemical
Societe "Geomines-Caen"
Societe Havraise de Manutention de Produits Petroliers
Societe Hoteliere de la Petite Campagne
Societe Immobiliere Paris-Niel
Societe Ivoirienne d'Operations Petrolieres S.A.
Societe Malgache de Raffinage
Societe Reunionaise d'Entreposage
Socony-Standard-Vacuum Oil Company (Petroleum Maatschappij)
Southern Natural Gas Development Pty. Ltd.
Standard Kosan Kabushiki Kaisha
Standard Service K.K.
Statfjord Transport A/S
Stockage Geologique de Gaz de Lavera
Sueddeutsche Erdgas Transport Gesellschaft mit beschraenkter Haftung
Sun East Company Ltd.
Superior Disk Corporation
Syncrude Canada Ltd.
Synergistics Industries Limited
204383 Enterprises Limited
369772 Alberta Inc.
393198 Alberta Inc.
TAR-Tankanlage Rumlang AG
TBN Tanklager-Betriebsgesellschaft Nuernberg mbH
TGF Tankdienst Gesellschaft Frankfurt
TGM Tankdienst Gesellschaft Munchen
Taihei Bussan K.K.
Taisei Kogyo Sekiyu Hanbai K.K.
Takahama Kosan Kabushiki Kaisha
Taketsuru Yugyo K.K.
Tankanlage A.G. Mellingen
Tanklager Altishausen A.G.

Tanklager Gesellschaft, Koln
Tanklager-Gesellschaft Tegel
Tanklager Lechelles I S.A.
Tanklager Taegerschen AG
Technica Quimica Petrolera, S.A. de C.V.
Tecumseh Gas Storage Limited
Thai Aliphatics Company Limited
THUMS Long Beach Company
Thyssengas G.m.b.H.
TIBA Speditions GmbH
Tohko Plastics Company, Limited
Tohpren Co. Ltd.
Tojo Gas K.K.
Toko Sekiyu K.K.
Tonen Energy and Marine (Singapore) Pte. Ltd.
Tonen Energy International Corp.
Tonen Kabushiki Kaisha
Tonen Kagaku Kabushiki Kaisha
Tonen Properties Inc.
Tonen Sogo Service Co., Ltd.
Tonen System Plaza Kabushiki Kaisha
Tonen System Service Kabushiki Kaisha
Tonen Tanker Kabushiki Kaisha
Tonen Tapyrus Company Limited
Tonen Technology K.K.
Tonex Company Limited
Towa Compounding Co. Ltd.
Towa Sekiyu K.K.
Toyoshina Film Company, Ltd.
Transalpine Oelleitung in Oesterreich Gesellschaft m.b.H.
Trans-Northern Pipelines Inc.
Transgaz Lavera
Tsurumaru Unyu K.K.
Turkish Petroleum Company, Limited
UBAG — Unterflurbetankungsanlage Flughafen Zurich

Ulan Coal Mines Limited
Ulan Coal Shippers Pty. Limited
United Industry Development Co., Ltd.
Van Salt Water Disposal Company
Wako Jushi Kabushiki Kaisha
Wako Kasei Kabushiki Kaisha
Wartempomp Nederland B.V.
Westdeutsche Erdoelleitungs — G.m.b.H.
Westgas G.m.b.H.
Winnipeg Pipe Line Company Limited
Worex S.N.C.
Yasaka Sekiyu K.K.
Yellowstone Pipe Line Company
Yoshiki Sekiyu Kabushiki Kaisha
Yoshimi Gas Kabushiki Kaisha
Yuai Sekiyu K.K.

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No. 92-75

In The

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October Term, 1992

THE LUBRIZOL CORPORATION,

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EXXON CORPORATION, *et al.*,

Respondents.

On Petition for a Writ of Ceriorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT EXXON CORPORATION

REASONS FOR DENYING THE WRIT

Despite the attempts of Lubrizol to convince this Court otherwise, there is neither a conflict among the courts of appeals nor any conflict between the decision below and the decision of this Court in *Salve Regina College v. Russell,* 111 S. Ct. 1217 (1991).

Lubrizol candidly admits that its complaint is not that the opinion of the Fifth Circuit violated the holding of *Salve Regina*, but is rather that the court below ignored the "spirit" of that decision. (Pet. at 6). As shown below, the Fifth Circuit is well aware of *Salve Regina* and violated neither its holding nor its spirit in this case.

The holding of *Salve Regina* is that "courts of appeals review the state-law determinations of district courts de novo." 111 S. Ct. at 1225. "Although the considered decision of a district judge naturally commands the respect of an appellate court, a party is entitled to meaningful review of that decision just as he is of any other legal question in the case, and just as he would have been if the case had been tried in a state court." *Id.* at n. 5, quoting 19 C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure, § 4507, pp. 106-110 (1982).

The Fifth Circuit has fully accepted the sound teaching of that case. In at least 17 cases in the 16 months since *Salve Regina* was decided, the Fifth Circuit has announced that it is reviewing the district court's determination of state law de novo. As Judge Jones explained in *City Public Service Board v. General Electric Co.*, 935 F.2d 78, 80 (5th Cir. 1991), the Fifth Circuit had "often held that a district court's interpretation of the law of the state in which it sits is entitled to 'special deference' on appeal and will be reversed only if 'obviously wrong.' " Those earlier decisions, she said, are "no longer authoritative. Under *Salve Regina College*, this court will undertake plenary review of the district court's interpretation of Texas law." 935 F.2d at 80. Undoubtedly there are many more cases, including this one, in which the Fifth Circuit has in fact followed *Salve Regina* and reviewed de novo even though it did not mention those magic words.

The issue in *Salve Regina* is somewhat different from the issue Lubrizol claims to discern here and about which it asserts that there is a conflict among the circuits. It is true that in the notorious case of *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278 (2d Cir. 1981), the Second Circuit held that it was bound by a decision of the Sixth Circuit concerning Tennessee law, except in "the rare instance when it can be said with conviction that the pertinent court of appeals has disregarded clear signals emanating from the state's highest court pointing toward a different result." That decision has been criticized. "It is hard to see why the decision of one court of appeals should have more than persuasive effect on a coordinate court on an issue as to which neither of them can speak with authority." C. Wright, Federal Courts 376 (4th ed. 1983).

But in this case there is not the slightest indication that the Fifth Circuit reviewed the decision of the district court in any fashion other than the de novo method required by *Salve Regina*. Nor is there any indication that either the district court or the court of appeals felt bound in any way by the decision of the Second Circuit in *Artvale, Inc. v. Rugby Fabrics Corp.*, 363 F.2d 1002 (2d Cir. 1966).

It is common ground that in New York, as generally, attorneys' fees are not recoverable for breach of contract. The issue in *Artvale*, as here, is whether this general rule applies in the special case of a suit for breach of a covenant not to sue. After a careful examination of the law, the Second Circuit concluded that the recoverability of attorneys' fees in a covenant not to sue case should turn on what the parties fairly contemplated, or would have had they addressed their minds to the problem. The court held that, by this standard, liability for fees can be imposed only where the covenant is expressly drafted to allow for fees or "for suits brought in obvious breach or otherwise in bad faith." 363 F.2d at 1008.

The district court correctly understood this. It described the holding of *Artvale,* and of a later Second Circuit opinion that restated the *Artvale* principles, *Bellefonte Re Ins. Co. v. Argonaut Ins. Co.,* 757 F.2d 523, 529 (2d Cir. 1985), and said:

> The New York state courts, however, have continued to hold that attorneys' fees are not recoverable for breach of contract. . . [citing cases]. The New York state courts have not, though, specifically addressed the recoverability of attorneys' fees for breach of a covenant not to sue, nor have they disapproved of *Artvale* or *Bellefonte.*

(App. 45a-46a). The Fifth Circuit, in turn, recognized that the district court had relied on *Artvale*, which, the Fifth Circuit said, is "a case that both frames the issue before us and sets a standard for resolving it." (App 9a). In a footnote the Fifth Circuit added that the *Artvale* rule "has been applied by courts deciding cases under New York law." For this proposition it cited three cases, only one of which had been cited by the district court (App. 10a at n. 5).

It is of the essence of the common-law method that courts consider and often rely on decisions from other courts, even when those decisions are not binding on them. The district court and the Fifth Circuit were in no way bound by the Second Circuit's decision in *Artvale.* But in the absence of other cases casting doubt on whether *Artvale* correctly stated New York law, they were entitled to give that decision persuasive effect, as they did. Indeed in the common-law tradition, decisions of other courts vary in the respect they are given. They "should be accorded such a measure of weight and influence as they may be intrinsically entitled to receive." H. Black, The Law of Judicial Precedents 11 (1928), quoted in R. Aldisert, The Judicial Process 778-779

(1976). The power of the court's reasoning and the reputation of the court and of the judge who wrote the opinion are factors taken into account.[1] The *Artvale* decision was by Judge Henry J. Friendly, a distinguished New York practitioner before he went to the bench and "universally recognized . . . as one of our wisest judges." *Finley v. United States*, 490 U.S. 545, 565 (1989) (Stevens, J., dissenting).

Of course even an opinion by Judge Friendly would have had to yield if there were evidence that he was wrong in his assessment of New York law or if more recent decisions had shown that New York law is not as he then thought it was. All of this was argued below. Lubrizol devoted eight pages of its opening brief in the Fifth Circuit and four pages in its reply brief to its argument that *Artvale* is inconsistent with New York law. It cited the same New York cases that it now relies on (Pet. at 8-9) in support of that position. Exxon in its brief below showed why those cases were inapposite and its analysis was accepted by the Fifth Circuit.

What Lubrizol cannot avoid is this simple fact, quickly and easily verifiable by computer-assisted research: despite the fact that *Artvale* is now 26 years old, no New York decision has ever

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1. Lubrizol claims that what it thinks the proper approach to appellate review "is most starkly demonstrated by *Gruver v. Midas Int'l Corp.*, 925 F.2d 280 (9th Cir. 1991)." (Pet. at 10). Yet in *Gruver* the Ninth Circuit did just what Lubrizol criticizes the courts below for doing in this case. Oregon law was controlling in that case. Oregon strictly adheres to the American rule barring recovery of attorneys' fees in breach-of-contract actions except where the contract provides for them. The Oregon decisions do not speak to the special case of breach of a covenant not to sue, but the Ninth Circuit found in a 1990 Colorado decision what it called "[t]he most recent and comprehensive review of the cases in this area" and concluded that Oregon would reach the same result as Colorado. 925 F.2d at 284.

criticized it or disapproved of it. In fact, the only New York case that ever cited it did so as the controlling rule of law and followed it to award attorneys' fees pursuant to an indemnity agreement that made no express reference to attorneys' fees, legal expenses, or the like. *Breed, Abbott & Morgan v. Hulko*, 139 A.D. 2d 21, 531 N.Y.S. 2d 240 (A.D. 1988), *aff'd*, 74 N.Y. 2d 686, 543 N.Y.S. 2d 373, 541 N.E. 2d 402 (1989). The *Breed* decision was fully discussed by both sides in their briefs below. Had the Fifth Circuit added a citation to that case in footnote 5 of its opinion, where it cited three federal cases applying *Artvale* under New York law (App. 10a), Lubrizol would have had no possible basis for complaint. Surely this Court has more pressing business than to take a court of appeals to task for the lack of a citation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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